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No. 1288

In the Supreme Court of the United States

OCTOBER TERM, 1970

PIPEFITTERS LOCAL UNION NO. 562, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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421-038—71——1

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OPINIONS BELOW

The opinion of the original panel of the court of appeals (Pet. App. A) is reported at 434 F. 2d 1116. The opinion of the court of appeals *en banc* (Pet App. B) is reported at 434 F. 2d 1127.

JURISDICTION

The original decision of the court of appeals was entered on June 8, 1970. A motion for rehearing *en banc* was granted and the judgment *en banc* (Pet. App. C) was entered on November 24, 1970. A petition for rehearing of the *en banc* decision was denied on December 17, 1970 (Pet. App. D). Mr. Justice

White extended the time for filing a petition for a writ of certiorari to February 1, 1971, and the petition was filed on January 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 610, as construed and applied by the courts below and on its face, abridges petitioners' rights under Article I, Section 2, of the Constitution, or under the First, Fifth, Sixth, or Seventeenth Amendments.

2. Whether the indictment alleged an offense.

3. Whether the facts support petitioners' convictions of conspiring to violate 18 U.S.C. 610.

4. Whether a special jury verdict that "a willful violation of [18 U.S.C. 610] was not contemplated" entitled petitioners to an acquittal.

5. Whether certain of the trial court's jury instructions were erroneous.

STATUTE INVOLVED

In pertinent part, 18 U.S.C. 610 provides:

> It is unlawful * * * for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organizations of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

STATEMENT

After a lengthy jury trial in the United States District Court for the Eastern District of Missouri, petitioners [1] were convicted on September 19, 1968, of

[1] The indictment charged Pipefitters Local Union No. 562 ("Local 562"), a labor organization affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, as well as three individuals (Lawrence L. Callahan, John L. Lawler, and George Seaton), who were its officers (A. 12–13). All are petitioners here. "A." references are to the appendix in the court of appeals.

conspiracy to violate 18 U.S.C. 610, which proscribes, *inter alia,* any contribution by a labor organization "in connection with any election at which Presidential and Vice-Presidential electors or a Senator or Representative * * * are to be voted for * * *." Local 562 was fined $5,000 and Callanan, Lawler, and Seaton were each sentenced to one year's imprisonment and fined $1,000. On appeal, a divided panel of the Court of Appeals for the Eighth Circuit affirmed. That court reheard the case *en banc,* and again affirmed petitioners' convictions in a split decision (4 to 3).

1. *The indictment.* In essence, the indictment charged that from 1963 until its return on May 9, 1968, petitioners conspired to violate 18 U.S.C. 610, by having Local 562 make political contributions in connection with certain federal elections (A. 12–25). As a part of the conspiracy, it charged, petitioners established and maintained a special political fund known as the "Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund" (the "Fund") (A. 14). The Fund was designed to appear wholly independent and separate from Local 562, but in fact it was simply an arm of Local 562, part and parcel of the union itself and intended to conceal that in truth Local 562 was making the political contributions in question (*id.*).

The Fund was financed by collections from members of Local 562, as well as non-members working within its jurisdiction (A. 15). Members of Local 562 who were supervisors were agents for the Fund at job sites and at the union's St. Louis headquarters;

they distributed Fund contribution agreement cards and maintained contribution records on the pipefitters working within the union's area (A. 15–16). By these means, the indictment charged, petitioners conspired to make substantial prohibited contributions in connection with the 1964 and 1966 election campaigns, with Callanan and Lawler issuing Fund checks to candidates for some $150,000 (A. 16).

2. *The evidence.* Local 562 exercises jurisdiction over all major jobs in more than half of the state of Missouri (A. 976). Although there are three other Pipefitters locals within this same territory, contractors on major jobs must seek their pipefitters from Local 562 (A. 976–980). Local 562 gives priority on these jobs to its own members, and then to the members of the other locals. The members of the other locals regularly work on jobs under the jurisdiction of Local 562, since, as a result of its limited membership policy, Local 562 cannot supply from its members all the workers needed (A. 1059). On such jobs the members of the other locals receive a higher wage rate than on work performed under the jurisdiction of their own locals (A. 750, 757).

The government's evidence showed that contributions to the Fund in fact were "assessed" by Local 562 (A. 163–165, 170, 179, 187, 218–219, 227–228, 232, 289–290, 293, 297, 320, 431–432, 456–457, 531, 533, 644); were part of the union's dues structure, in that the total amount of dues and Fund "contributions" collected by the union from both members and non-members was a fixed, predetermined sum (A. 487–

500, 745, 754, 985, 1001; E. 532–534 [2]); were collected from non-members in lieu of union dues to Local 562, in amounts identical to the aggregate of the dues and Fund contributions paid by members (A. 470–478, 1010–1014, 1042; E. 465–466); were considered an integral part of the union's financial resources and expended for union purposes (A. 673–678, 683, 729–730, 787–788, 802, 814–819, 1018–1019, 1035–1036, 1077; E. 395, 493–494); and were diverted to a "gift fund" for petitioner Callanan, the "contributions" to which were made in the same manner as, and temporarily in place of, contributions to the Fund (A. 117–128, 221, 771; E. 180–285). The Fund had no constitution or by-laws, no minutes of meetings, no membership roll, and no recording secretary (A. 1018–1019). Its books were not audited, and it made no accounting for its expenditures (A. 103, 1077). The union's officers controlled every aspect of the Fund, and it was no more independent of Local 562 than any of its other subdivisions.

As a result of these efforts, the Fund was highly successful. During the period 1963–1966, its contributors donated to it in excess of $1,230,000 (A. 131; E. 1). In the same period, it disbursed over $151,000 in connection with the election campaigns of various federal candidates (A. 132; E. 2). Because of the Fund's performance on this score, Local 562 and its officers became well known in the nation's highest political circles and were highly in-

[2] "E." references are to volume three of the appendix, which contains the trial exhibits.

fluential with the national affiliate (E. 380–382, 417, 418, 452–543). The union and its leaders were given full credit for the political activities of the Fund, in recognition of the fact that it was inextricably a part of, indeed was indistinguishable from, the operations of the union itself.

3. *The jury instructions and verdict.* Petitioners sought to counter the government's evidence by introducing testimony that all contributions to the Fund were voluntarily made to it as an independent entity, and without regard to the union's obvious involvement in its operations. In petitioners' view, there could be no offense if in fact the contributions were voluntary, and they requested jury instructions to this effect (Pet. 7–9, 30–32). The trial judge rejected petitioners' argument, and instead adopted the government's theory, that Section 610 was violated if in fact the Fund was merely a subterfuge through which the union itself made proscribed political contributions, irrespective of whether the moneys so contributed were voluntarily given to the Fund by the contributors. The trial judge did, however, instruct the jury to consider the evidence that the payments were voluntary in determining if it was the union or the Fund as a separate entity that made the political contributions in question (A. 1112–1113, 1116).[3]

[3] The court's instructions on this subject were as follows (A. 1112–1114, 1116):

> You will note that Section 610 prohibits contributions by labor organizations for use in connection with an election for a federal office. It does not prohibit any per-

After admonishing that it could convict petitioners of the offense charged only if they "knowingly, willfully and purposely did an act which the law forbids" (A. 1110), the trial judge told the jury that he had prepared two verdict forms for their use and that they were to return their verdict on one of the two

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son from making or agreeing to make such contributions or setting up an independent fund for such purpose separate and distinct from union funds either alone or in conjunction with others, simply because such person happens to be a member of a labor organization. That is, the statute is not violated unless the contribution is in fact and in the final analysis made by the labor organization.

In this case evidence was offered by the Government to the effect that funds were contributed to or on behalf of candidates for federal office and that such funds were paid out upon checks drawn upon the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund. It is necessary, therefore, that the evidence establish that the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund was in fact a union fund, that the money therein was union money, and that the real contributor to the candidates was the union. As to this issue, the defendants contend that the fund in question was a bona fide entity separate and apart from the union, established by the voluntary good faith act of members of the pipefitters Local 562 and others, from which contributions to condidates were made on behalf of the persons who created the fund and not on behalf of the union. On the other hand, the Government contends that the fund was a mere artifice or device set up by the defendants and others as a part of the alleged conspiracy to give the outward appearance of being an independent and separate entity but in fact constituting a part of union funds.

In determining whether the Pipefitters Voluntary Fund was a bona fide fund, separate and distinct from the union or a mere artifice or device, you should take into considera-

forms (A. 1119). The first form was to be used "to return a verdict of either guilty or not guilty of the offense charged;" the second form should be used "only in the event you find one or more of the defendants guilty of the willful conspiracy charged and further find that the conspiracy * * * did not contemplate a willful violation of Section 610" (*ibid.*). The jury returned its verdict on the second form, finding that petitioners each were guilty as charged but that "a willful violation of Section 610 of Title 18, United States Code, was not contemplated" (A. 1126). Petitioners made no objection to use of the two verdict forms or to the instructions concerning them.

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tion all the facts and circumstances in evidence, and in such consideration you may consider

* * * * *

10. Whether or not contributions to the fund were required as a condition of employment or continued employment of membership in Local 562,

11. Whether or not the individuals who contributed to said fund signed a voluntary contribution agreement,

12. Whether or not the contributions to said fund were made voluntarily or involuntarily * * *.

* * * * *

A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money.

4. *The appeal.* Petitioners urged in the court of appeals that 18 U.S.C. 610, on its face and as applied by the trial court, was constitutionally defective under Article I, Section 2 of the Constitution and the First, Fifth, Sixth, and Seventeenth Amendments; that the indictment did not allege an offense; that insufficient evidence supported the jury's verdict; and that the jury's determination that a willful violation of 18 U.S.C. 610 was not contemplated required acquittal of conspiracy (Pet. 13–14). In their brief petitioners insisted that these matters required a reversal "without a new trial, and no request is made for a new trial," and limited the relief sought to "a reversal and discharge of the defendants" (see Pet. App. B, p. A 25; Pet. 14). The court affirmed in a divided decision, with the majority (Van Oosterhout and Blackmun, J.J.) explictly considering and rejecting each of the grounds urged by petitioners (Pet. App. A, pp. A 1–16). Judge Heaney, in dissent, objected to the trial court's instructions on the "voluntariness" issue, and concluded that this necessitated a new trial (Pet. App. A, pp. A 17–21).

The Court then granted petitioners' request for rehearing *en banc.* In a supplemental brief, petitioners adopted the reasoning of Judge Heaney's dissent and asserted that the erroneous instructions on "voluntariness" required a new trial. The *en banc* court affirmed petitioners' convictions *per curiam,* for "the reasons set out in the panel majority opinion * * *" (Pet. App. B, p. A. 23). In a separate opinion, the four judges making up the majority further expressed the view that petitioners, by their explicit presentation on the original appeal, "had deliberately

and consciously elected to abandon and waive any and all claims of prejudicial trial errors * * *" (Pet. App. B, p. A 25). Three dissenting judges urged reversal and a new trial for the reasons assigned in Judge Heaney's earlier opinion. Because they thought the statute does not preclude the use of funds voluntarily contributed by union members (see Pet. App. A–39), they found it unnecessary to consider the constitutional issue.

ARGUMENT

1. Petitioners level a variety of constitutional challenges to the validity of 18 U.S.C. 610, the underlying statute on which their conspiracy conviction was predicated (Pet. 17–27). All of these claims are premised on petitioners' assertion that the trial court "construed Section 610 as prohibiting officers, agents and members of a union from forming a parallel political organization and utilizing the union leaders, officers and agents in such political organization, in the obtaining, pooling and expending of direct voluntary contributions for political purposes," and that the statute as so construed prohibits "union members from voluntarily pooling their financial resources in political association, in an organization separate from the union, through their chosen leaders * * *" (Pet. 17, 19).

These arguments misconceive the basis of this case. The government's evidence established that Local 562 employed the Fund as an artifice to circumvent 18 U.S.C. 610, and that in truth union moneys, and not moneys from an independent organization, were used to make the political contributions in question. This

was the essential charge of the indictment and the theory on which the case was tried. Indeed, the trial court unequivocally admonished the jury that in order to convict petitioners it had to find as follows (A. 1112):

> It is necessary, therefore, that the evidence establish that the [Fund] was in fact a union fund, that the money therein was union money, and that the real contributor to the candidates was the union. * * *

Accordingly, in its constitutional aspect, this case does not involve political contributions by entities actually separate and apart from unions, as petitioners contend, but rather involves direct contributions by the union itself, the very sort of direct political activity which the present statute and its long line of predecessors sought to prohibit. Only a contribution or expenditure by a union is within the reach of 18 U.S.C. 610; the activities of a *bona fide* entity independent of the union are not covered. The government's case fully recognized this essential distinction, as did the careful instructions to the jury.

Moreover, although the district court properly instructed the jury that it need not find that the contributors to the Fund were strictly required to do so by the union, the evidence plainly established that the contributions were not voluntary in the sense of spontaneity. And the jury was properly instructed to consider this evidence among the various factors that would determine whether the Fund was in fact separate from the union. The government showed that the "contributions" to the Fund were universally referred to as "assessments" (A. 290, 293, 294, 318, 380,

425, 431, 441, 456). The foremen uniformly collected them once each week from all of the men in their charge (A. 121). At least two foremen were unable to distinguish between these and other assessments levied by the union (A. 297, 320). Each payment was noted in a book which the foremen turned in with the money to the union hall (A. 216). If a workman did not pay for one week, the foreman or steward would write "owe" in the book (A. 161, 256). If a workman had not paid the week before and hence paid doubly the following week, the foreman often wrote "back assessment" in the book to account for the greater amount (A. 293, 318, 425, 449). Several men testified that as far as they knew, everybody paid into the Fund (A. 164, 170, 187).[3a] Others stated that they thought such payments were necessary if one were to get work (A. 201, 212, 270, 402). Thus, although most workers may have willingly made their payments to the Fund, the evidence plainly showed strong institutional pressure by the union for them to do so, as well as an intimate union interconnection with the establishment and administration of the Fund. This case therefore does not involve a voluntary organization set up by the workers apart from the union.

a. Petitioners first contend (Pet. 19–21) that 18 U.S.C. 610 as here applied denied their First Amendment rights of political association and expression. But the very fact that the statute does not apply to

[3a] There were, however, exceptions. Apprentices never contributed (A. 181, 307, 454). Other men were exempted for hardship reasons (A. 183, 223, 620–621) and some because of jurisdictional disputes with other unions (A. 405, 406).

prevent formation of independent voluntary organizations to give public expression to union political sentiment points to its legitimate and narrow reach. Under the statute union members may freely form voluntary political organizations to make political contributions; the only proscription is against the union itself making such contributions. To be sure, even the general funds of the union may be used for a variety of political activities, so long as the union does not engage, as it did here, in active electioneering on behalf of particular federal candidates designed to reach the public at large. See *United States* v. *C.I.O.*, 335 U.S. 106; see also *United States* v. *Automobile Workers*, 352 U.S. 567, 588–589. By proscribing activity of this latter sort, Congress sought to achieve narrow, well-defined and highly important objectives—to reduce undue institutional influence by unions on federal elections, to preserve the purity of such elections against the use of aggregated wealth, and to protect union members holding political views contrary to the union's (see *United States* v. *C.I.O.*, *supra*, 335 U.S. at 115, 134–135; *United States* v. *Automobile Workers*, *supra*, 352 U.S. at 575).[*] Compare *Red Lion Broadcasting Co.* v. *Federal Com-*

[*] Petitioners cite numerous First Amendment cases to support their view, but none of these dealt with the precise issue involved here or undercuts our contentions as to the First Amendment validity of 18 U.S.C. 610. This Court twice avoided passing on the First Amendment validity of Section 610 (in the *C.I.O.* and the *Automobile Workers* cases), although the opinion in the latter case (see 352 U.S. at 575) suggests the argument for constitutionality which we make, and which the court below accepted, in the present case.

munications Commission, 395 U.S. 367; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616–620.

b. Similarly without merit is petitioners' claim that the statute is impermissibly vague. This argument is again grounded on the erroneous notion that this case involves a "separate voluntary fund." Rather, the offense involved in this case was the making of direct political contributions by the union in the ordinary understanding of such terms. See *United States* v. *Petrillo*, 332 U.S. 1, 7–8.

c. Nor does the statute impose "an unjustifiable discrimination" against persons of the working class (Pet. 23) or impair their electoral rights (Pet. 25–26). Section 610 does not, as petitioners suggest, prohibit such persons from group political action. It merely proscribes such action when in fact it is undertaken by the union itself. Members of a union remain free to associate for political purposes through voluntary organizations of their choice, and to make contributions by means of such organizations to Federal candidates.

2. Petitioners contend (Pet. 27–29) that the indictment failed to state an offense because it did not allege that the moneys contributed came from dues or the general funds of Local 562, and that the evidence was insufficient to prove that the Fund was in fact a union operation or to show that petitioners conspired to violate Section 610. It was not necessary to allege in the indictment that the contributions in question were made from union dues or general funds. The gist of the government's case, which the indictment

plainly indicated, was that the Fund was merely a sham by which the union sought to hide the political activities in which it was directly engaged; as the indictment related, petitioners hoped "thereby [to] conceal the fact that Local 562 would make contributions and expenditures in connection with [federal] elections" (A. 14). Plainly the indictment stated an offense under Section 610.

Similarly, the evidence summarized in the Statement, *supra*, amply supports, as the court below held, the jury's finding that "the fund was not a bona fide separate and distinct entity but was in fact a device set up to circumvent the provisions of § 610 and that the fund constituted union money" (Pet. App. A, p. A 7).

3. The jury's special verdict "that a willful violation of Section 610 * * * was not contemplated" does not, as petitioners urge (Pet. 29–30), entitle them to an acquittal. Petitioners' argument is premised on the theory that in so finding the jury also found that the conspiracy was not willful. But this does not follow,[5] and ignores the context in which the jury

[5] Petitioners reason as follows (Pet. 30): in order to be guilty of violating a *malum prohibitum* statute like Section 610, it must be shown that the alleged conspirators knew that the object of the conspiracy was unlawful; the jury found precisely to the contrary in its special verdict, by determining that a willful violation of Section 610 was not contemplated; and therefore the jury acquitted them. But there is no need to pass upon this abstract legal argument in this case, since the trial judge made plain that willfulness was an essential element of the conspiracy charged and an entirely different consideration prompted use of the special verdict form. And this fact plainly distinguishes the present case from those cited by petitioners as being in direct conflict.

returned this finding, which accounts for why the jury did so and negates petitioners' contentions.

The trial judge repeatedly admonished the jury that it could convict petitioners only if it found that the conspiracy charged was willful—"done voluntarily and purposely and with the specific intent to do that which the law forbids" (A. 1110; see also A. 1109, 1111, 1117–1118). The additional inquiry as to whether the conspiracy, if found, contemplated a willful violation of Section 610 is explained by the fact that a substantive conviction under that statute could be either a felony or misdemeanor, depending on whether "the violation was willful" (18 U.S.C. 610, p. 3, *supra*). The jury instructions made clear that the conspiracy charged required that petitioners have intentionally engaged in the conspiratorial activity; the special verdict was necessary to determine if petitioners, having intentionally acted contrary to the law, aggravated the crime by willfully flouting the proscriptions of Section 610. All parties understood that this was the purpose of the instructions, and approved of them, as is shown by the fact that petitioners' counsel voiced "[n]o objection" to their use (A. 1095). In these circumstances there is no need for further review of this isue.[6]

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[6] Moreover, even if this instruction permitted the jury to be inconsistent in its verdict it hardly follows that this warrants reversal of the conspiracy convictions. On the contrary, this case would then not differ materially from cases in which courts have ruled that inconsistent verdicts do not require reversal of convictions. *E.g.*, *Dunn* v. *United States*, 284 U.S. 390; see *United States* v. *Dotterweich*, 320 U.S. 277, 279; *United States* v. *Carbone*, 378 F. 2d 420, 422–423 (C.A. 2), certiorari denied, 389 U.S. 914.

4. Petitioners' objections to the instructions on the "voluntariness" issue (Pet. 30–33) were not raised on the original appeal. The rehearing majority considered that in the circumstances of this case any conceivable error on this score had been deliberately and consciously abandoned by petitioners, and thus upheld the earlier affirmance without discussing the merits of this claim. In any event, the argument is without merit and does not warrant further review.

Whether the payments to the Fund were voluntary was in fact an important issue in the trial. The trial judge instructed the jury (see n. 3, p. 7, *supra*) to consider this, along with the other evidence, in determining if the Fund, and the political contributions made from it, were in reality a union fund and union contributions. He added that the mere fact that some or even all of the payments to the Fund were voluntary would not, of itself, preclude the jury from making the crucial ultimate finding that the Fund was in truth a union operation. This instruction was entirely correct under our view of Section 610.

In essence, petitioners' claim reiterates their basic assertion, that Section 610 cannot constitutionally proscribe political activities on the part of the union where such activities are undertaken with the consent of the participants and contributions are not strictly coerced. However, the statute, and the legislative purposes to be served thereby, unmistakably prohibit direct political contributions by unions, even of funds thus "voluntarily" obtained. And as we argue above (pp. 11–14, *supra*) the narrow limitation thus im-

posed on the constitutional rights of petitioners and others similarly situated does not render Section 610 invalid.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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